Supreme Court, U.S.
FILED
JUL 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-981, 87-1028, 87-1146
Consolidated

In The
Supreme Court of the United States
October Term, 1987

—o—

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

JOHN C. RAINEY,
Respondent,

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

RONDI M. KNOWLTON,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

REPLY BRIEF OF PETITIONER, BEECH AEROSPACE SERVICES, INC.

—o—

W. H. F. WILTSHIRE
HARRELL, WILTSHIRE, SWEARINGEN,
WILSON & HARRELL, P.A.
201 East Government Street
Post Office Drawer 1832
Pensacola, Florida 32598
(904) 432-7723

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. ADMISSIBILITY OF THE JAG REPORT	1
A. SURPRISE	1
B. INABILITY TO CROSS-EXAMINE THE AUTHOR OF THE OPINION	5
C. NORMATIVE JUDGMENTS	5
II. POLICY CONSIDERATIONS	6
III. CROSS-EXAMINATION OF RAINEY	7
IV. APPLICATION OF RULES 106 AND 801(1)(B) FOR THE FIRST TIME IN THE ELEVENTH CIRCUIT OPINION — TOO LATE — AND INAPPLICABLE	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 805 F.2d 49 (2d Cir. 1986) 4

Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979) 9

O'Donnell v. Georgia Osteopathic Hospital, Inc., 748 F.2d 1543 (11th Cir. 1984) 4

Rainey v. Beech Aircraft Corp., 784 F.2d 1523 (11th Cir. 1986) 12

Reese v. Mercury Marine Div. of Brunswick, Corp., 793 F.2d 1416 (5th Cir. 1986) 9

Tate v. Robbins & Meyers, Inc., 709 F.2d 10 (1st Cir. 1986) 11

Zenith Radio Corporation v. Matsushita Electric Industries Co., Ltd., 505 F.Supp. 1125 (E.D. Pa. 1980) 5

FEDERAL RULES OF EVIDENCE

103(a)(2), Fed.R.Evid. 9

103(c), Fed.R.Evid. 10

106, Fed.R.Evid. 8, 10, 11

403, Fed.R.Evid. 2, 4

704, Fed.R.Evid. 7

801(d)(1)(B), Fed.R.Evid. 10, 11

803(8)(C), Fed.R.Evid. 5, 6

OTHER AUTHORITIES

Page

4 J. Weinstein & Berger, *Weinstein's Evidence*, § 103[03] 1985 9

McCormick, *Evidence*, § 11 (3d ed. 1984) 6

McCormick, *Evidence*, § 51 (1972) 11

ADDITIONAL FEDERAL RULES OF EVIDENCE INVOLVED

4. Federal Evidence Rule 103 10

Rulings on Evidence

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

• • •

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

• • •

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

I

ADMISSIBILITY OF THE JAG REPORT
A—SURPRISE

Respondents ("Rainey" or "plaintiffs") claim that the trial judge's ruling on July 10, 1984, that opinions contained in the JAG Report would be admissible came as a surprise on the eve of trial. This was a primary issue which was consistently contested. Rainey was, or should have been, prepared to attack trustworthiness, but didn't. They were tactically content to claim "surprise" and completely avoid the issue of trustworthiness. Please consider the following:

1. Rainey's pre-trial memo submitted four months before trial declared their readiness to attack the trustworthiness of the JAG Report. Referring to LCDR Morgan's qualifications, at page 16 (R. Vol. 4, 207) they confidently state:

> While there is yet no evidence in the record to this effect, (trustworthiness) plaintiff is prepared at trial to introduce evidence that the person who conducted the JAG investigation was not a trained or experienced aircraft mishap investigator, or trained to investigate the highly complex nature of an air crash.

Despite this announcement:

(a) No effort was made to depose LCDR Morgan at any time.

(b) He was never listed as a witness.

(c) Defendants moved for a summary judgment involving the JAG Report and had a hearing on June 6, 1984, five weeks prior to the trial date. (R. Vol. 3, 183; Vol. 4, 211; Vol. 5, 228)

(d) Thereafter briefs were filed urging the trial judge to admit the opinions in the JAG Report. (R. Vol. 5, 266)

(e) Plaintiffs even filed and briefed a Motion in Limine to exclude the entire JAG Report on June 15, 1984, four weeks before trial. (R. Vol. 5, 268-269)

2. Opinions in the JAG Report were declared admissible by the trial judge on the eve of trial, July 10, 1984. Rainey promptly moved for permission to call additional witnesses at trial to impeach the trustworthiness of LCDR Morgan and the JAG Report, and submit additional instructions. This motion was granted. They did not:

(a) Add or call additional witnesses.

(b) *Move for a continuance.* Fed.R.Evid. 403.

(c) Ask for an opportunity to depose LCDR Morgan.

(d) Ask for a break in the trial or before commencement of trial to depose LCDR Morgan.

(e) Subpoena LCDR Morgan or report to the court they tried but couldn't locate him.

(f) In good faith, pursue any other avenue of relief.

3. It is respectfully submitted that Rainey either couldn't impeach LCDR Morgan's credibility or the trustworthiness of the JAG Report—or elected to tactically "stonewall" it and utilize "surprise" as a ground for appeal. Plaintiffs had two weeks during trial to utilize their experts to impeach the trustworthiness of the JAG Report or LCDR Morgan's experience or attempt to call LCDR Morgan, if they were ready and able to discredit Morgan's qualifications as announced in their pre-trial memo four months earlier.

4. Another puzzling event occurred during trial on July 16th. Rainey called Mr. Hall, their expert on engines and other matters. On cross-examination by Mr. Womack (Beech's counsel) he opened the door for Mr. Hall to give

his views on the JAG Report. Hall had previously testified he had read the JAG Report, reviewed photographs and other records. (T-4, pp. 153, 154). The following occurred (T-4, p. 170):

> Q. Now, you read the JAG Report in this case, I think you said.
>
> A. Not all of it. I read a portion of it.
>
> Q. Well, did you read the findings, the factual findings and conclusions of the report?
>
> A. I believe I read the findings and conclusions.
>
> Q. What was your view of that?
>
> Mr. Partington (Plaintiffs' counsel): Your Honor, this is completely beyond the scope and improper.
>
> The Court: This is the second time you've gone into this Mr. Womack. The objection is again sustained.

It is difficult to conceive of a more dramatic and opportune time for Plaintiffs, through their allegedly highly qualified experts, and at defendants' invitation, to scuttle the JAG Report, illuminate LCDR Morgan's alleged lack of qualifications and destroy the content of the JAG Report. This was not done apparently because:

(a) Plaintiffs could not effectively demonstrate untrustworthiness.

(b) They wanted to save their assault until rebuttal if and after the JAG Report was admitted, which they didn't.

(c) Rainey tactically wanted to preserve their position that the trial judge's change in ruling six days earlier constituted surprise and error.

Certainly, it came as no surprise to plaintiffs that defendants would press for the admission of all relevant parts of the JAG Report opinions into evidence. It often occurs that, because of developments during trial, evidence considered inadmissible prior to trial may become admissible as the trial develops. Trial counsel has a duty to anticipate and be prepared for such a development.

Counsel must be alert for developments during trial that may result in admission or exclusion of evidence contrary to the judge's pre-trial ruling. This Court should not condone a deliberate election on the part of plaintiffs not to depose Morgan, call and impeach him at trial, or fail to challenge the JAG Report. Further, to allow plaintiffs to take this position and, if dissatisfied with the verdict, seek a new trial on appeal, clearly would be an unacceptable result. It would encourage a flood of appeals and the award of new trials would become the rule rather than the exception.

It is also inappropriate to claim surprise for the first time on appeal. *Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986). Fed. R.Evid. 403 advisory committee note provides: "[T]his rule does not enumerate surprise as a ground for exclusion (of evidence)." *See also O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1549 (11th Cir. 1984) *"The remedy for coping with surprise is not to seek reversal after an unfavorable verdict, but a request for continuance at the time the surprise occurs."*

B—INABILITY TO CROSS-EXAMINE THE AUTHOR OF THE OPINION

Rainey and Knowlton complain of the unfair burden placed upon them by allowing public reports and records to be submitted to the jury. They do so in the face of their inexplicable failure to interview, depose, list or call LCDR Morgan as a witness and their failure to allow one of their experts (Hall) to criticize the JAG Report and LCDR Morgan at trial.

These criticisms go to the very existence of Fed.R. Evid. 803(8)(C). The presumption of trustworthiness, compounded by plaintiffs' failure to depose LCDR Morgan or pursue the many other preparatory and protective remedies available are inexcusable. Any matter complained of was either invited or induced by plaintiffs.

C—NORMATIVE JUDGMENTS

Plaintiffs quote Weinstein in the hope of distinguishing "normative conclusions" from opinions. They cite *Zenith Radio Corporation v. Matsushita Electric Industries Co., Ltd.*, 505 F.Supp. 1125 (E.D. Pa. 1980) and Weinstein's comments thereon as follows:

> The treatise advocates that "[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted." Vol. 4, p. 803-251. *Weinstein* also quotes with approval the opinion of a District Judge who, after an extensive review of the Rule 803(8)(C) cases, stated it is now generally accepted that "evaluative reports of public agencies (i.e., those rendering normative judgments *or opin-*

ions, not just reciting facts) are admissible." (Resp. Br. p. 28) (emphasis added).

They argue that Weinstein distinguishes normative judgments from opinions. In doing so they misread what is written. Weinstein clearly says: "it is now generally accepted that 'evaluative reports of public agencies' (i.e., those rendering normative judgments *or opinions,* not just reciting facts) are admissible." (emphasis added).

BASI can't help but wonder what the impact would be on Dean McCormick, who observed that the fact/opinion differentiation has "proved to be the clumsiest of all tools furnished the judge. . . ." McCormick, *Evidence,* § 11 at 27 (3d ed. 1984). We would respectfully submit that by adding Rainey's interpretation to the formula, Dean McCormick would conclude it would result in *no tool at all.*

II

POLICY CONSIDERATIONS

BASI identified five principles of policy which support the admissibility of evaluative reports. These principles demonstrate the soundness of this construction of Rule 803(8)(C) and center on *reliability, time, necessity, value,* and the *harmonious spirit* of the Federal Rules of Evidence. (BASI Br. pp. 20-26) Rainey failed to adequately address even the first of these policies. It is simply argued that "fairness" dictates they be given an opportunity to cross-examine the author of the report. Fairness does, however, mandate that the jury be given the opportunity to see and evaluate an official impartial

investigation into this accident and accept or reject the trustworthy report which resulted therefrom. Such a report is not excluded simply because it embraces the ultimate issue to be decided by the trier of fact. Fed.R.Evid. 704

In its initial brief, BASI traced the development of this rule from the Advisory Committee's notes through Congressional action, court opinions and those of legal scholars, which result in the soundness of the policies established. There is a solid line of logic and wisdom which support the admissibility of evaluative reports. The arguments advanced by Rainey fail to address the soundness of these interpretations.

Finally, it is not the wealth of cases that control. It is the logic and wisdom contained in these opinions that serve as essential guidance. BASI respectfully urges the Court to approve the admission of the evaluative findings contained in the JAG Report and reverse the decision of the Eleventh Circuit Court of Appeals on this issue.

III

CROSS-EXAMINATION OF RAINEY

In justifying the admission of improper opinion evidence, plaintiffs rely on portions of Rainey's letter that were *never published to the jury by testimony or by document.* Specifically, that Rainey's wife violated pattern integrity and turned crosswind without proper interval. Both the original panel and the *en banc* panel of the Eleventh Circuit based their reversal on an incorrect understanding, as expressed in the panel opinion, that Beech questioned Rainey about the damaging admissions

contained in his letter to the JAG investigator. (infra. pp. 12-13)

IV

APPLICATION OF RULES 106 AND 801(d)(1)(B) FOR THE FIRST TIME IN THE ELEVENTH CIRCUIT OPINION—TOO LATE—AND INAPPLICABLE

Plaintiffs fail to directly address the points raised by BASI demonstrating that Fed.R.Evid. 106 was misapplied by the Eleventh Circuit Court of Appeals. Briefly stated, these points are:

> (1) Rule 106 must be positively invoked in a timely fashion or it is waived. This rule was never raised by Rainey at trial, never argued to the trial judge on the Motion for New Trial, and not briefed nor argued before the Eleventh Circuit Court of Appeals.
>
> (2) Rule 106 may not be used as a vehicle to admit otherwise inadmissible testimony. Rainey had not been and never was qualified as an expert to express an opinion on the probable cause of the accident, and the trial judge properly sustained the objection. (J.A. 77; infra. p. 11)
>
> (3) Rule 106 is only applicable where portions of a document sought to be admitted are necessary to explain other portions already admitted. Rainey's opinion on probable cause did not explain or qualify the portions of the letter relating to the pilots' preflight activities and the final flight maneuvers about which Rainey was questioned on direct examination.

Plaintiffs only argue, *without citation of legal authority,* that they were excused from making an offer of proof because the substance of the evidence was apparent from the

leading nature of the question. This falls far short of the requirements imposed by law.

In asserting objections to a trial court's exclusion of evidence, a party is required under Fed.R.Evid. 103(a)(2) to carefully articulate every ground for which the evidence is admissible. This Rule provides:

> Rule 103—RULINGS ON EVIDENCE
>
> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * *
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

See also Huff v. White Motor Corp., 609 F.2d 286, 290 n.2 (7th Cir. 1979); 4 J. Weinstein & M. Berger, *Weinstein's Evidence,* § 103[03], 103-31, 32 (1985). The rationale supporting this requirement was explained in *Reese v. Mercury Marine Div. of Brunswick Corp.,* 793 F.2d 1416, 1421 (5th Cir. 1986):

> Busy trial courts should not be required to repeat trials, especially civil trials, because the trial judge has excluded evidence for lack of a clear understanding of the proponent's purpose in offering the evidence. The trial judge must be put on notice of the purpose for which the evidence is offered while there is still time to remedy the situation. It is the proponent's duty, not that of the trial court, to articulate the purpose for which the evidence is offered.

On cross-examination of Rainey (called by Beech as an adverse witness) his counsel skipped from subject to

subject in an effort to rehabilitate his client in areas covered on direct examination. The inquiry was not a question but a statement of Rainey's unqualified opinion that the most probable cause of the accident was rollback. Rainey's counsel asked:

> Q. One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably primary cause of this mishap was rollback?
>
> Mr. Toothman: I would object to this, Your Honor. Probable cause is an opinion.
>
> The Court: I beg your pardon?
>
> Mr. Toothman: He's trying to get an opinion out of him now, not a fact.
>
> The Court: Objection sustained. (J.A. 77)

If Rainey's counsel believed the opinion was admissible under Rule 106 or to remedy an impression of inconsistency under Fed.R.Evid. 801(d)(1)(B), then he was required to articulate that reasoning to the trial judge. Perhaps counsel was satisfied to simply make that statement to the jury, despite the objection which was sustained. Such matters are rarely rejected or forgotten by a jury. It is improper to purposely present evidence of such a questionable nature to a jury without either giving opposing counsel a reasonable chance to object or present it for ruling by the judge outside the presence of the jury. (Fed.R. Evid. 103(c)) Had he done so he could have fairly and in a timely manner called Rules 106 and 801(d)(1)(B) to the attention of the trial judge. The judge could have then made a fair and informed ruling. Fed.R.Evid. 103(c) provides:

> Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Counsel failed to act properly and cannot now rely on these rules for a reversal of the jury's verdict. As the court explained in *Tate v. Robbins & Myers, Inc.*, 709 F.2d 10, 12 (1st Cir. 1986):

> A party may not claim an error on appeal in the exclusion of evidence unless the district court was told not only what the party intended to prove but also for what purpose. See, e.g., 4 Weinstein Evidence, § 103 [03], at 103-33 (1985 ed.) ("In making an offer of proof counsel must be careful to articulate every purpose for which the evidence is admissible; a purpose not identified at the trial level will not provide a basis for reversal on appeal."). Thus, if evidence is excluded because it is inadmissible for its only articulated purpose, the proponent of the evidence cannot challenge the ruling on appeal on the ground that the evidence could have been rightly admitted for another purpose." McCormick, *Evidence* § 51, at 112 (1972).

It is clear from the transcript that the trial judge believed the only purpose for which Rainey was questioned was to offer an unqualified expert opinion on the cause of the accident. No other purpose was articulated by Rainey's counsel, and the Eleventh Circuit *sua sponte* misapplied Rules 106 and 801(d)(1)(B) to find reversible error.

In the original panel opinion the Eleventh Circuit for the first time *sua sponte* raised Rules 106 and 801(d)(1)(B). In doing so it erroneously assumed that the following damaging statements in the letter were published to the jury. ["*In paragraph four, Rainey had written that the*

aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval." Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir. 1986)] (emphasis added). These statements were *not submitted to the jury in any form.* Obviously both the original panel and *en banc* panel erroneously assumed this was submitted to the jury and this erroneous impression motivated both panels to reverse on this point. This was such a departure from the acceptable and usual course of judicial proceedings so as to require a reversal by this Court. Sup.Ct.R. 17.1(a).

CONCLUSION

The decisions of the Eleventh Circuit Court of Appeals should be reversed and the cause remanded to the district court for reinstatement of the final judgments for defendants.

Respectfully submitted,

W. H. F. WILTSHIRE
HARRELL, WILTSHIRE, SWEARINGEN,
WILSON & HARRELL, P.A.
201 East Government Street
Post Office Drawer 1832
Pensacola, Florida 32598
(904) 432-7723

Counsel for Petitioner BASI